# In the Matter of the estate of Chen Ngow @ Chen Seong Chin, deceased, and another petition

HIGH COURT (KUALA LUMPUR) — PETITION FOR PROBATE NOS S-32–817 OF 2009 AND S-32–280 OF 2010
ZABARIAH MOHD YUSOF J
3 JUNE 2011

*Succession — Wills — Validity — Probate sought in respect of photocopies of two wills of same date but bearing different marks of deceased — Original copies of wills not filed — Suspicious circumstances surrounding making of wills — Deceased terminally ill and mentally weak at time wills made — No evidence to show deceased had testamentary capacity to execute wills — Whether wills forgeries*

Two petitions for probate of two different sets of wills allegedly executed by the same deceased were heard together by the High Court. One petition was filed jointly by three grandsons of the deceased ('the joint petitioners') in respect of a will dated 3 September 2003 ('the first will'). The other was filed by one of the deceased's sons, Chen Yoke Kian ('Chen') who had filed photocopies of two wills dated 18 July 2007 ('the two wills') and sought probate for one of them. The marks attributed to the deceased in the two wills were different from each other. They were also different from the marks in another document — a power of attorney, also allegedly executed by the deceased on 18 July 2007 — which Chen had filed in proceedings in another court. Even before the probate actions were filed, the joint petitioners had given Chen a copy of the first will and asked him to join them as co-petitioners. He declined, saying the deceased had executed a later will dated 18 July 2007 but never acceded to the joint petitioners' request for a copy of same. Chen also did not produce or file the original copy of the two wills in court for the probate hearing, even after his counsel undertook to do so. The joint petitioners questioned the authenticity of the two wills and believed the signatures attributed to the deceased therein were forgeries as he could not have had the testamentary capacity to execute them due to his frail health. The deceased died in September 2007, three months after being diagnosed with advanced terminal colon cancer. He had been on morphine for the whole of the three months. His physical and mental health had deteriorated so rapidly within that time that even prior to the date of the two wills, he could not understand simple questions or answer coherently and, in all probability, was mentally incapacitated.

**Held**, allowing the petition of the joint petitioners with costs and granting them probate as joint executors of the first will, dismissing Chen's petition with

costs and declaring the two wills as invalid and ordering costs of both probate actions to be borne by Chen:

(1) Since the original of the two wills were not produced or filed in court, as mandatorily required by O 71 r 7(1) of the Rules of High Court 1980, they were not proven and could not be admitted to probate. On this ground alone, Chen's petition failed (see paras 17 & 19 - 20).

(2) Chen's failure to file the original of the two wills into court greatly prejudiced the joint petitioners as they were deprived of the opportunity to have them examined by a document examiner. Even to an untrained eye, the marks in the two wills were crude forgeries of the deceased's mark (see paras 18 & 35).

(3) Chen failed to dispel the suspicious circumstances surrounding the making of the wills and failed to discharge the burden of proving the deceased had testamentary capacity to execute them (see para 38).

(4) The question why there were two wills allegedly executed by the deceased on the same date and both bearing a different mark as his signature was not explained. The day the wills were allegedly made was the day the deceased was admitted to hospital due to severe anemia and after vomiting blood. The witnesses who testified on Chen's behalf were all interested witnesses who told inconsistent stories and lacked credibility (see paras 29, 104 & 109).

(5) At the time the two wills were executed, the deceased was in all probability very weak mentally and physically, not rational and terminally ill. In that very weak state, it strongly suggested Chen could have exercised undue influence on the deceased (see para 99).

(6) The first will was prepared by a professional will writer and the deceased was verified by an attending physician as fit to execute that will which provided for equal division of the deceased's land, shares and residuary estate amongst the joint petitioners. No credible evidence was shown why the deceased suddenly had a radical change of mind to make the two wills totally depriving the joint petitioners and leaving the entire estate to Chen with whom the deceased was not even on talking terms (see paras 90 & 97).

**[Bahasa Malaysia summary**

Dua petisyen untuk probet bagi wasiat-wasiat berbeza yang didakwa disempurnakan oleh si mati didengar bersama di Mahkamah Tinggi. Satu petisyen difailkan secara bersama oleh ketiga-tiga cucu si mati ('pempetisyen bersama') berhubung wasiat bertarikh 3 September 2003 ('wasiat pertama'). Wasiat yang satu lagi difailkan oleh anak kepada si mati, Chen Yoke Kian ('Chen') yang memfailkan dua salinan wasiat bertarikh 18 Julai 2007 ('dua wasiat') dan menuntut probet untuk salah satu daripada wasiat tersebut.

Tanda-tanda yang merujuk kepada si mati dalam kedua-dua wasiat adalah berlainan antara satu sama lain. Ia juga berbeza dengan tanda-tanda di dalam dokumen lain — satu surat kuasa wakil, yang juga didakwa disempurnakan oleh si mati pada 18 Julai 2007 — di mana Chen telah memfailkan prosiding-prosiding di dalam mahkamah lain. Malah, sebelum tindakan-tindakan probet difailkan, pempetisyen bersama telah memberikan Chen satu salinan wasiat pertama dan meminta beliau untuk menyertai mereka sebagai pempetisyen bersama. Beliau menolak, dengan mengatakan bahawa si mati telah menyempurnakan sebuah wasiat terkemudian bertarikh 18 Julai 2007 tetapi tidak pernah memberikan salinan wasiat tersebut meskipun diminta oleh pempetisyen bersama. Chen juga tidak pernah mengemukakan atau memfailkan salinan asal kedua-dua wasiat di mahkamah untuk pendengaran probet, meskipun selepas peguam beliau mengakujanji untuk berbuat demikian. Pempetisyen bersama mempersoalkan ketulenan kedua-dua wasiat dan percaya bahawa tandatangan yang merujuk kepada si mati adalah palsu memandangkan si mati tidak mungkin mempunyai keupayaan perwasiatan untuk menyempurnakannya disebabkan kesihatan beliau yang lemah. Si mati meninggal dunia pada September 2007, tiga bulan selepas didiagnos dengan kanser usus peringkat akhir. Beliau juga mengambil morfin selama keseluruhan tiga bulan tersebut. Keadaan fizikal dan mental beliau telah merosot dengan cepat dalam jangkamasa tersebut malah sebelum tarikh kedua-dua wasiat tersebut, beliau tidak dapat memahami soalan-soalan mudah atau menjawab secara logik dan, berkemungkinan ketakupayaan mental.

**Diputuskan**, membenarkan petisyen pempetisyen bersama dengan kos dan membenarkan probet mereka sebagai wasi-wasi bersama wasiat pertama, menolak petisyen Chen dengan kos dan mendeklarasikan kedua-dua wasiat sebagai tidak sah dan mengarahkan kos bagi kedua-dua tindakan probet tersebut ditanggung oleh Chen:

(1) Memandangkan kedua-dua wasiat asal tidak dikemukakan atau difailkan di mahkamah, sebagai keperluan mandatori oleh A 71 k 7(1) Kaedah-Kaedah Mahkamah Tinggi, wasiat-wasiat tersebut tidak dibuktikan dan tidak boleh diterima untuk probet. Berdasarkan alasan ini sahaja, petisyen Chen gagal (liat perenggan 17 & 19–20).

(2) Kegagalan Chen untuk memfailkan kedua-dua wasiat asal di mahkamah akan memprejudiskan pempetisyen bersama secara serius memandangkan mereka tidak diberikan peluang untuk menggunakan kedua-dua wasiat asal tersebut untuk diperiksa oleh pemeriksa dokumen. Malah, meskipun tidak bergelar pakar, tanda-tanda di dalam kedua-dua wasiat tersebut jelas menunjukkan pemalsuan tandatangan si mati (lihat perenggan 18 & 35).

(3) Chen gagal untuk menghapuskan keadaan-keadaan mencurigakan di sekitar wasiat tersebut dibuat dan gagal untuk menolak beban

membuktikan si mati mempunyai keupayaan perwasiatan untuk menyempurnakannya (lihat perenggan 38).

(4) Persoalan kenapa kedua-dua wasiat didakwa disempurnakan oleh si mati pada tarikh yang sama dan kedua-duanya mengandungi tandatangan berbeza tidak dijelaskan. Pada hari wasiat tersebut didakwa dibuat, si mati dimasukkan ke hospital disebabkan kekurangan darah yang serius dan selepas muntah darah. Saksi-saksi yang menjadi saksi bagi pihak Chen merupakan saksi-saksi berkepentingan yang memberitahu cerita-cerita yang tidak konsisten dan tidak mempunyai kredibiliti (lihat perenggan 29,104 & 109).

(5) Pada masa kedua-dua wasiat disempurnakan, si mati berkemungkinan sangat lemah dari segi mental dan fizikal, tidak rasional dan tenat. Di dalam keadaan lemah tersebut, Chen mungkin telah menggunakan pengaruh tidak wajar ke atas si mati (lihat perenggan 99).

(6) Wasiat pertama disediakan oleh penulis wasiat profesional dan si mati disahkan oleh doktor sebagai berkeupayaan untuk menyempurnakan wasiat yang memperuntukkan pembahagian sama rata hartanah, saham-saham dan baki estet si mati kepada pempetisyen bersama. Tidak terdapat keterangan boleh dipercayai yang menunjukkan kenapa si mati secara tiba-tiba berubah fikiran untuk membuat kedua-dua wasiat yang menolak pempetisyen bersama dan meninggalkan keseluruhan harta kepada Chen yang tidak pernah pun berbaik dengan si mati (lihat perenggan 90 & 97). ]

**Notes**

For cases on validity, see 11 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 2789–2793.

**Cases referred to**

*AGS Harta Sdn Bhd v Liew Yok Yin* [2010] 1 MLJ 309, CA (refd)
*Banks v Goodfellow* [1870] LR 5 QB 549 (refd)
*Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj Tunku Mahkota Johor v Datuk Captain Hamzah bin Mohd Noor and another appeal* [2009] 4 MLJ 149, FC (refd)
*Eu Boon Yeap & Ors v Ewe Kean Hoe* [2008] 2 MLJ 868, CA (refd)
*Tho Yow Pew & Another v Chua Kooi Hean* [2001] 5 MLJ 578, HC (refd)
*Udham Singh v lndar Kaur* [1971] 2 MLJ 263, FC; (refd)

**Legislation referred to**

Evidence Act 1950 ss 64, 65
Rules of the High Court 1980 O 71 r 7(1)

*Lee Teong Hooi (Bernard Poi with him) (Poi Tsze Meng & Co) for the Petition No S-32–280 of 2010.*

*Justin Voon (CP Lee with him) (Sidek Teoh Wong & Dennis) for the Petition No S-32–817 of 2009.*

**Zabariah Mohd Yusof J:**

BACKGROUND

**[1]** There are two petitions for probate filed premised upon two different sets of wills allegedly executed by the Chen Ngow @ Chen Seong Chin, deceased, ie:

(a) S-32–817 of 2009: which was filed in the Kuala Lumpur High Court by the grandsons to the deceased ie —

Chen Teck Foong,
Chen Teck Lee,
Chen Teck Seng;

(b) S-32–59 of 2008: which was filed in the Seremban High Court by one of the sons of the deceased ie Chen Yoke Kian.

**[2]** Petition No S-32–59 of 2008 was transferred to Kuala Lumpur to be consolidated with Petition No S-32–817 of 2009.

**[3]** Subsequently S-32–59 of 2008 (from Seremban High Court) was renumbered to S-32–280 of 2010.

**[4]** The following are agreed and undisputed facts:

(a) The deceased had executed the following documents:

(i) the charge and charge annexure dated 4 October 1993 registered on 7 October 1993 vide Presentation No 39826/93 Jilid 83 Folio 189;

(ii) the charge and charge annexure dated 4 October 1993 registered on 7 October 1993 vide Presentation No 39827/93 Jilid 83 Folio 190; and

(iii) the charge and charge annexure dated 14 March 1993 registered on 24 March 1995 vide Presentation No 11388/95 Jilid 23 Folio 9

('the charges')

(b) The deceased was diagnosed with advance terminal cancer on 18 June 2007 and was admitted on numerous occasions until his demise on 17 September 2007.

(c) The deceased was given morphine since June 2007.

(d) The deceased went to China with Chen Teck Foong, the first petitioner in Probate No S-32–817 of 2009 on 10 July 2007 and return to Malaysia on 14 July 2007.

(e) From 18 June 2007 until the demise of the deceased on 17 September 2007, the deceased's health deteriorated deeply.

(f) The deceased died on 17 September 2007.

(g) Pursuant to court order dated 23 July 2008 under Kuala Lumpur High Court Originating Summons No S-24–622 of 2008 the deceased had during his lifetime made a gift inter vivos of the land held under Geran 26167 Lot 1821 Mukim Kajang, Daerah Ulu Langat, Negeri Selangor (the said property) by creating an irrevocable power of attorney dated 10 December 2004 (the irrevocable power of attorney) and a supplementary agreement thereto dated 10 December 2004 (the first deed of trust) and therefore the said property do not form part of the estate of the deceased.

(h) The petitioner Chen Yoke Kian's suit in Kuala Lumpur High Court Suit No S-22–679 of 2008 to declare, inter alia, that the said irrevocable power of attorney and the first deed of trust void and to declare the said property as part of the estate of the deceased was struck out and dismissed with costs, inter alia, on the ground of res judicata on 19 August 2009.

(i) The previous solicitors for the petitioners under Petition for Probate No S-32–817 of 2009 had forwarded three sets of notice of appointment of solicitors and petition for probate to petitioner Chen Yoke Kian to be included as a joint-petitioner and for his affirmation before a commissioner for oath vide letter dated 28 September 2007. However, the said documents were not returned by the petitioner Chen Yoke Kian.

(j) Therefore, the petitioner Chen Yoke Kian is unwilling to act as one of the executors and trustees of the deceased's estate pursuant to the will dated 3 September 2003.

(k) On 17 January 2008, the petitioner Chen Yoke Kian affirmed an affidavit under Shah Alam Originating Motion No 21–6 of 2008 and exhibited a photocopy of a will dated 18 July 2007 and a power of attorney also dated 18 July 2007, both alleged to have been executed by the deceased on the same day but both documents bear different marks.

(l) The second petitioner Chen Teck Lee had on 20 February 2008 affirmed an affidavit under Shah Alam Originating Motion No 21–6 of 2008 to challenge the will dated 18 July 2007 exhibited by the petitioner Chen Yoke Kian on 17 January 2008 as it bears a different mark from the deceased's mark in contemporaneous documents such as the three charges.

(m) Subsequently, on 11 March 2008, the petitioner Chen Yoke Kian filed a

petition for probate in the Seremban High Court under Probate No 32–59 of 2008 and had on 10 March 2008 exhibited a photocopy of another will dated 18 July 2007 alleged to have been executed by the deceased but bears a different mark from the will dated 18 July 2007 exhibited on 17 January 2008 in the Shah Alam Originating Motion No 21–6 of 2008.

(n) The originals of both wills dated 18 July 2007 was not exhibited to the Petition for Probate No 32–59 of 2008 (now 32–280 of 2010) filed in court.

(o) The second petitioner, Chen Teck Lee had lodged a police report on 2 July 2008 pertaining to the following documents alleged to have been executed by the deceased on 18 July 2007 but each bears a different mark:

(i) The will dated 18 July 2007 exhibited on 17 January 2008 in the Shah Alam Originating Motion No 21–6 of 2008;

(ii) The power of attorney dated 18 July 2007 exhibited on 17 January 2008 in the Shah Alam Originating Motion No 21–6 of 2008; and

(iii) The will dated 18 July 2007 exhibited on 10 March 2008 in the Seremban High Court Probate No 32–59 of 2008 (pursuant to court order dated 3 December 2009, Probate No 32–59 of 2008 has been transferred and consolidated with the Kuala Lumpur High Court Probate No S-32–817 of 2009 under Probate No S-32–280 of 2010).

(p) Both witnesses named in the wills dated 18 July 2007, namely Chin Kon Shu and Lim Chye Lai are friends of petitioner Chen Yoke Kian.

**[5]** Both the petition for probate came before me for trial and the main issue for determination is the validity of the two wills dated 18 July 2007 (ID1 and ID D6).

**[6]** Witnesses were called at the trial. The petitioner Chen Yoke Kian called four witnesses and the petitioners Chen Teck Foong, Chen Teck Lee and Chen Teck Seng called three witnesses.

**[7]** At the end of the trial I found that the two wills dated 18 July 2007 (ID1 and ID D6) are not valid and the last will of the deceased is the will dated 2 September 2003 (D31). Below are my reasons for such findings:

ORIGINAL COPIES OF DOCUMENTS NOT PRODUCED

**[8]** At the trial, the original copy of the following documents were not produced:

(a) the two wills dated 18 July 2007 (marked as ID1 & ID D6);

(b) the power of attorney dated 18 July 2007 (marked as ID D7);

(c) the alleged deed of trust dated 21 August 2007 (marked as ID D17); and

(d) the alleged revocation of power of attorney dated 15 September 2007 (marked as ID D25).

**[9]** Besides questioning the testamentary capacity of the deceased when executing the two wills (ID1 and ID D6), the same are being heavily disputed by the petitioners Chen Teck Foong, Chen Teck Lee and Chen Teck Seng, as to its authenticity. The said the petitioners doubted that the deceased did ever execute the said documents and believed that the signatures on the said documents have been forged.

**[10]** There is no evidence before the court as to the original will which forms the substratum of the matter in the proceedings herein.

**[11]** Moreover, ID D7, ID D17, ID D25 relates to the land which has been ruled by the court in the preliminary issue application before the trial, as not being part of the deceased's estate.

**[12]** Essentially, the authenticity of the two wills (ID1 and ID D6) is the central issue. The original copies were not filed in court despite the specific and mandatory requirement of O 71 r 7(1)of the Rules of the High Court 1980 which provides that:

> Every will in respect of which application for a grant is made must be exhibited to the Petition and a certified true copy of the will be annexed thereto.'

**[13]** The word 'must' in the said order means that it is a mandatory requirement and its compliance is essential, failure in which is fatal. The Federal Court case of *Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj Tunku Mahkota Johor v Datuk Captain Hamzah bin Mohd Noor and Another appeal* [2009] 4 MLJ 149 explains the effect of the usage of the word 'must' in a given provision. The Federal Court held at para 31 that:

> ... when the word 'must' is used, the intention is to fully ensure that it is complied with and no discretion is to be given as far as the compliance with the prerequisites is concerned. 'Must' is a very strong word: in my opinion it is stronger that the word 'shall'.

Thus, the word 'must' in its ordinary meaning means a mandatory obligation.

**[14]** Further it is to be noted from the minutes of the file, counsel for Chen Yoke Kian, Mr Bernard Poi had given his undertaking on 29 July 2010 to file the original copy of the wills dated 18 July 2007 on 30 July 2010.

**[15]** As far as the courts records are concerned, until the date of the trial, there has not been any filing of the original wills into court. Clearly there have been breaches of undertaking by counsel for Chen Yoke Kian when he failed to file the original copy of the wills to court.

**[16]** Counsel for the petitioner Chen Teck Foong submits that there has been a breach of ss 64 and 65 of the Evidence Act 1950 when the original is not shown and neither of the exceptions for secondary evidence satisfied for secondary evidence to be admissible.

**[17]** In any event, I agree that s 65 of the Evidence Act 1950 is not applicable because our case involves a probate action where the validity and authenticity of the wills dated 18 July 2007 are being challenged. There is no other way but to comply with the requirement of O 71 r 7(1)of the Rules of the High Court 1980.

**[18]** The failure of the petitioner Chen Yoke Kian to file the original wills into court has greatly prejudiced the petitoners Chen Teck Foong, Chen Teck Lee and Chen Teck Seng, as they have been deprived of the opportunity to have the wills examined by a document examiner, as they strongly believe that the two wills dated 18 July 2007 were forgeries.

**[19]** Since the original of the wills dated 18 July 2007 are not produced, and neither have it being filed into court, the wills in ID1 and ID D6 are not proven and cannot be admitted.

**[20]** On this ground alone, the petition by Chen Yoke Kian fails.

WHETHER THERE WAS SUSPICIOUS CIRCUMSTANCES SURROUNDING THE MAKING OF THE WILIS

*The two wills dated 18 July 2007 and the PA dated 18 July 2007 bears different marks*

**[21]** It is not in dispute that the deceased had executed a will dated 3 September 2003 (D31).

**[22]** Subsequently, there are in existence two wills dated 18 July 2007 allegedly executed by the deceased. These two wills are being challenged as to its validity by the petitioner Chen Teck Foong, Chen Teck Lee and Chen Teck Seng.

**[23]** The petitioner Chen Yoke Kian is the uncle to the petitioners Chen Teck Foong, Chen Teck Lee and Chen Teck Seng.

**[24]** It was in evidence that the deceased allegedly executed two wills dated 18 July 2007. The court marked the two wills as ID1 and ID D6.

**[25]** It is to be noted that these ID1 and ID D6 both bear different marks as signature of the deceased, despite it being allegedly marked by the deceased on the same date 18 July 2007.

**[26]** Chen Yoke Kian's Petition No S-32–280 of 2010 exhibited the will which is exhibited at ID1.

**[27]** However, during cross examination, Chen Yoke Kian said that he is relying on the will marked as exh ID D6.

**[28]** No matter which of the wills dated 18 July 2007 the petitioner Chen Yoke Kian is seeking to rely on, both have not been proven. The authenticity has not been proven.

**[29]** The question as to why there were two wills which was allegedly executed by the deceased on the same date and both bear a different mark as his signature, was not explained.

**[30]** The counsel, Bernard Poi who was a witness to the execution of the wills was precluded from being a witness, as he is the counsel acting for the petitioner Chen Yoke Kian in this probate action.

**[31]** Besides the two wills bearing different marks, the power of attorney (ID D7) which was also allegedly executed by the deceased on 18 July 2007 also bear a different mark. The testimonies of Chen Yoke Kian and witnesses who testified on his behalf stated that ID D7 was executed after the two wills. A glance at all three documents, (ID1, ID D6 and ID D7) all bear different marks despite it being allegedly signed on 18 July 2007, one after the other. No explanation was given by ttie witnesses for Chen Yoke Kian as to why that was so.

**[32]** Chen Yoke Kian's earlier testimony in cross examination stated that only the two wills were signed on 18 July 2007 as 'that is all I can remember'. However when ID D7 was shown to him, it seemed to have jolted his memory when he said 'Now I remember'. It is rather illogical for one not to remember these facts because it is rather peculiar that two wills dated the same date but

bearing different marks of the deceased. It is an unusual situation and would have been imprinted in the mind of those witnessing it. However, it is not so with Chen Yoke Kian.

**[33]** Further in Chen Yoke Kian's witness statement at P9, he said that on 18 July 2007, the deceased had instructed the lawyer to prepare the power of attorney (ID D7). However it must be noted that ID D7 was signed on 18 July 2007. It is improbable for the instructions to be given to the lawyer on 18 July 2007 and the documents were made ready by the lawyers and executed all on the same day for the following reasons:

(a) there is no evidence that the lawyer, Bernard Poi met the deceased on 18 July 2007;

(b) there is also the evidence that the deceased was admitted to hospital in the afternoon on 18 July 2007 after vomitting blood. Hence the alleged execution of the two purported wills and the power of attorney (ID1, ID D6 and ID D7), if it is to be believed, must have happened in the morning of 18 July 2007, as the evidence and testimonies seemed to suggest that the execution of the wills and the power of attorney was not done at the hospital. It is not possible for the instruction to be given to the lawyers on 18 July 2007 and all documents executed in the very same morning.

**[34]** The purported signature/marks of the deceased on the wills dated 18 July 2007 (ID1 & ID D6) show a significant difference with the undisputed marks of the deceased in documents marked as D10-D15. SD2 and SD3 testified that the marks in ID1 and ID D6 are not marks of the deceased which they are familiar with. There was no explanation by Chen Yoke Kian or witnesses that testified on his behalf as to why it was so.

**[35]** Looking at the disputed marks of the deceased in ID1 and ID D6 and comparing it with the undisputed marks of the deceased in D10-D15, even to the normal untrained eye of an expert, the marks as found in ID1 and ID D6 are crude forgeries of the deceased's mark. (Refer to the case of *AGS Haifa SB v Liew Yok Yin* [2010] 1 ML J 309).

**[36]** As has been stated earlier, there is no occasion for the petitioner Chen Teck Foong to verify the marks in ID1 and ID D6 through an expert as the originals of the wills were never produced at all to the court nor to be inspected by the petitioner Chen Teck Foong.

WHETHER THE DECEASED HAS THE TESTAMENTARY CAPACITY

**[37]** Even assuming for a moment that the originals of the two wills dated 18

July 2007 were produced and filed before the court, the burden of proving that the deceased had testamentary capacity and to dispel all suspicious circumstances surrounding the making of the will lies on the person propounding the will ie petitioner Chen Yoke Kian (refer to *Udham Siungh v lndar Kaur* [1971] 2 MLJ 263).

**[38]** It is my finding that the petitioner Chen Yoke Kian has failed to discharge the burden of proof that at the time when the deceased executed the will dated 18 July 2007:

(a) that he had failed to dispel the suspicious circumstances surrounding the making of the two wills dated 18 July 2007; and

(b) the deceased had the testamentary capacity execute the wills.

THE SUSPICIOUS CIRCUMSTANCES

**[39]** The petitioner Chen Yoke Kian was first given a copy of the deceased's will dated 3 September 2003 for his execution on the affidavit to the petition for probate vide petitioners Chen Teck Foong, Chen Teck Lee and Chen Teck Seng's previous solicitor's letter dated 28 September 2007 (D22).

**[40]** Chen Yoke Kian's solicitors vide letter dated 8 October 2007 stated that the deceased had executed a later will dated 18 July 2007.

**[41]** The second petitioner, Chen Teck Lee ('SD3') via his previous solicitors Messrs YH Teh & Quek's letter dated 16 October 2007 (D39) requested for a copy of the alleged will of the deceased dated 18 July 2007.

**[42]** SD3 (Chen Teck Lee) in his evidence stated that he never received any reply from Chen Yoke Kian nor his solicitors with regards to his request for a copy of the purported wills dated 18 July 2007. SD3's evidence was never challenged on this. Until the demise of the deceased on 17 September 2007, the request of the copy of the will was never acceded to.

**[43]** Chen Yoke Kian only produced a copy of one of the wills dated 18 July 2007 (ID D6) on 17 January 2008. This was via affidavit affirmed by Chen Yoke Kian on 17 January 2008 where Chen Yoke Kian exhibited a copy of the will dated 18 January 2007. Chen Teck Lee affirmed an affidavit on 20 February 2008 at D20 challenging the validity and authenticity of the said will dated 18 July 2007 expressly stating that the mark appearing on the purported will (ID D6) is not the mark of the deceased (see D14).

**[44]** It is to be noted that despite the challenges put forth by Chen Teck Lee

in his affidavit, there was no rebuttal from Chen Yoke Kian nor reply on the alleged will dated 18 July 2007. What is pertinent to note is also the fact that Chen Yoke Kian did not mention anything about the presence of a second will (ID1) allegedly executed by the deceased on the same date of 18 July 2007.

**[45]** It was only subsequently, when Chen Yoke Kian filed his petition of probate in the High Court of Seremban and exhibited a different will dated 18 July 2007 (ID1) on 10 March 2008, that the second will was disclosed.

**[46]** The petitoners Chen Teck Foong, Chen Teck Lee and Chen Teck Seng then filed an affidavit opposing Chen Yoke Kian's petition on 29 September 2009 challenging the validity and the authenticity of the wills dated 18 July 2007 (ID1 and ID D6). Again there was no reply nor rebuttal from Chen Yoke Kian.

**[47]** I am of the view that, if it is really true that the deceased had executed two wills dated 18 July 2007, the petitioner Chen Yoke Kian would have disclosed from the beginning as early as 8 October 2007 (when Chen Yoke Kian's solicitors wrote the letter dated 8 October 2007 to Chen Teck Foong, Chen Teck Lee and Chen Teck Seng) that there were two wills dated 18 July 2007 executed. The wills would have been shown to the petitioners Chen Teck Foong, Chen Teck Lee and Chen Teck Seng then. However in this case there was no disclosure by the petitioner Chen Yoke Kian from the beginning as to the existence of the second will dated 18 July 2007. This raises suspicion as to the circumstances of the creation and the production of the wills.

**[48]** In fact until the decision of this case was delivered, the original copy of the two wills were never given to this court, as had been promised by the Chen Yoke Kian's counsel, Mr Bernard Poi.

It has been shown that at the time of making of the alleged will dated 18 July 2007 the deceased was:

(a) not well as he was suffering from a terminal cancer;

(b) ocassionally under morphine;

(c) admitted to hospital after vomiting blood on the same day he allegedly executed the last will; and

(d) during this time, it was in evidence that the deceased cannot even speak coherently.

**[49]** With all these circumstances, it is incumbent for the petitioner Chen Yoke Kian to establish medically that the deceased at that point in time when he executed the two wills dated 18 July 2007 have the necessary testamentary capacity.

**[50]** It is trite law that a person's physical decayed body does not have any relation to his state of mind to constitute him having testamentary capacity.

**[51]** The fact that the deceased was suffering from a terminal cancer, by itself, bears no relation whatsoever to his mental capacity to undertake a transaction. As Cockburn CJ observed in *Banks v Goodfellow* [1870] LR 5 QB 549:

> In deciding upon the capacity of the testator to make his will, it is the soundness of the mind, and not the particular state of the bodily health, that is to be attended to; the latter part may be in a state of extreme imbecility, and yet he may possess sufficient understanding to direct how his property shall be disposed of.

**[52]** In a later passage Cockburn CJ said:

> But his memory may be very imperfect; it may be greatly impaired by age or disease; he may not be able at all times to recollect the names, the persons, or the families of those with whom he had been intimately acquainted; may at times ask idle questions, and repeat those which had before been asked and answered, and yet his understanding may be sufficiently sound for many of the ordinary transactions of life.

**[53]** *Banks v Goodfellow* demonstrates, that the person's body is no reflection of his mental ability to deal with his property. Hence, what is important is for the deceased to have the testamentary capacity at the time when he executed the two wills on 18 July 2007. The burden to prove this, lies on the petitioner, Chen Yoke Kian.

**[54]** Chen Yoke Kian and his witnesses testified that the deceased was well and appeared jovial, chatty and was able to walk from the house to the office to sign the purported will dated 18 July 2007.

**[55]** Chen Yoke Kian's counsel submitted that there is nothing sinister when someone at the last minute decides to change his will. I am in full agreement with this point of submission. However, one must look at the totality of the facts and circumstances of the case to determine whether the deceased had the testamentary capacity to execute the wills dated 18 July 2007.

**[56]** It is pertinent to look at the evidence of the witnesses that relates to the consition of the deceased at the time of the execution of the wills dated 18 July 2007.

EVIDENCE OF SP1 (CHIN KON SHU)

**[57]** SP1 is one of the witnesses to the two wills dated 18 July 2007 allegedly executed by the deceased.

**[58]** In SP1's witness statement in Q and A No 4 of P2 (SP1's witness statement), SP1 testified that on 18 July 2007, he went to Chen Yoke Kian's home and together with the deceased waited for the arrival of the lawyer.

**[59]** In the later part of his examination-in-chief, when his counsel was asking him further additional questions in examination in chief, he said he saw the deceased walked alone from his house to the office which is about 20 metres. He said that he first met the deceased on 18 July 2007 at his office and that he had talked to the deceased.

**[60]** In Q and A No 4, SP1 said that the meeting on 18 July 2007 was at 10am. However in cross-examination SP1 said he could not remember the time the meeting took place.

**[61]** It was also in cross-examination that SP1 said that he could not remember how many times he signed the will on 18 July 2007.

**[62]** But what is pertinent is his evidence during cross-examination when SP1 said that the deceased had no problem signing the will and confirmed that there was no need for the deceased to resign the will. This piece of evidence taken in the light of Chen Yoke Kian who had produced two wills dated 18 July 2007 which bear different marks allegedly by the deceased and which was witnessed by SP1 himself, certainly raised doubts as to the truth of what has been said by SP1 in his evidence with regards as to what actually happened on 18 July 2007.

**[63]** There were two wills dated 18 July 2007 allegedly made by the deceased, both have different marks by the deceased, surely SP1 would have recalled the incident as it is a rather peculiar situation for someone to sign two wills differently on the same date.

**[64]** It was also in evidence that SP1 is a close friend of Chen Yoke Kian. Taking this fact into account and his evidence, I am of the view that SP1's evidence has to be treated with caution as he is not an independent witness.

EVIDENCE OF SP2 (CHEN YOKE KIAN)

**[65]** The evidence of SP2 is riddled with inconsistencies as can be seen from the following:

(a) In cross-examination, SP2 said that he first saw the five documents after the deceased passed away.
However, in his witness statement at Q and A13, 16,19 of P9 (SP2's

witness statement) as well as subsequent cross-examination, SP2 testified that he was present during the execution of the five documents.

(b) SP2 in his petition and affidavit which verified the petition pleaded and stated on oath that the original will dated 18 July 2007 (ID1) had been filed in court. It is an undisputed fact that, until the trial, no original copy of the wills dated 18 July 2007 was ever filed by SP2 with the court.

(c) At Q and A 16 of P9, SP2 said that the deed of trust (ID D17) was executed at the office of the deceased.
However during cross-examination, SP2 said that the deed of trust (ID D17) was executed at home.

(d) At Q and A 19 of P9, SP2 states that the revocation of power of attorney (ID D25) was executed at the hospital.
In cross-examination SP2 said that It was executed at home.

(e) At Q and A 16 of P9, SP2 said that the deceased instructed his lawyer to prepare a deed of trust for him to execute.
In cross-examination, SP2 agreed upon the suggestion of the counsel for Chen Teck Foong that it was he who had instructed the preparation of the deed of trust at ID D17.

(f) At Q and A 18 of P9, SP2 said that the deceased gave specific instructions to SP2 to instruct the solicitor to prepare a revocation of an earlier power of attorney signed by the deceased which is in the hands of his grandsons (Chen Teck Foong, Chen Teck Lee and Chen Teck Seng).

**[66]** In cross-examination SP2 said as follows:

Q: Refer to B/84 (ID D25) you wanted to make double/triple sure to get the Property, so you Instructed Bernard Poi to prepare this document.

A: My father gave a nod.

Q: Who was asking the question for your father to nod.

A: I told him someone attending to sell off his property, using don't know what, uncertain who are the buyer.

Court: Who asked the question?

A: I asked the question.

Q: Can you repeat your question to the Court now, what you asked your father?

A: I asked: Whether he wants to revoke any PA given/done before this PA he gave to me.

**[67]** The testimony of SP2 contains material consistencies and

contradictions which raises doubts as to his credibility as a witness.

SP3 (Lim Chye Lai)

**[68]** Lim Chye Lai is the second witness who allegedly witnessed the signing of the wills dated 18 July 2007. His evidence is also filled with inconsistencies, for eg:

(a) At Q and A 4 of P27 (SP3's witness statement), seems to suggest that the lawyer was the last to arrive at the office on 18 July 2007 as can be seen in his testimony which states:

> I was told by the petitioner to come to his office... I went there and met the deceased, the petitioner and Chin Kon Shu... Soon the lawyer came … However during further examination in chief, SP3 said that he was the last to arrive.

(b) At Q and A 3 of P21, SP3 states that:

> The petitioner informed me that his father, the deceased, is going to make a Will and wanted me to be a witness to the Will. I agreed.

In cross-examination SP3 indirectly said that it was Chen Yoke Kian who requested him to be a witness to the will. This can be seen when he said:

Q: You and Chin Kon Shu and Chen Yoke Kian are close friends?

A: Yes.

Q Of course, Mr Chen Yoke Kian chose you and Chin Kon Shu as witnesses.

A: Yes.

In re-examination, SP3 testified that it was the deceased who had asked him and Chin Kon Shu to be witnesses:

Q: On 18.7.2007, Chen Seong Chin sign the Will, does he understand why you all went to see him?

A: The deceased asked us to be his witnesses.

(c) It Is undisputed that SP3 is a close friend to Chen Yoke Kian and on 18 July 2007; SP3 was also a tenant to Chen Yoke Kian.

SP4: (Chen Foong Yew)

**[69]** SP4 is one of the daughters of the deceased. Her testimony in cross examination are as follows:

Q: Refer to Deed of Trust (ID D17). Are you a beneficiary under the Deed of Trust?

A: No.

Q: You are not a beneficiary under the Estate?

A: Yes, confirm not a beneficiary.

Q: Do you have any interest in the Estate?

A: No.

Q: Refer to Bundle C page 15 and 16 (D29). This is your lawyer's letter?

A: Yes.

Q: This letter, you said you are a beneficiary of the Land under a secret trust.

A: I can't really recall this.

...

Q: This is a letter dated 26.2.2008, sooner than 21.8.2007. You realized you are inconsistent? So you said you cannot remember. You alleged you are 1 of the beneficiaries under a secret trust for the said Land.

A: I cannot recall.

Q: Please read out the land stated in the Deed of Trust. It is the same Land in your lawyer's latter?

A: Same. This is asked by my mother to do something to give her back something. I support my mother.

Q: Which one do you support- Secret Trust of Deed of Trust?

A: I think I will go back to Deed of Trust because my Mom passed away.

Q: Earlier you said you support your brother when you signed the Deed of Trust?

A: I support my father.

Q: If secret Trust overtaken by Deed of Trust, your lawyer won't be writing the letter on 26.2.2008.

A: I'm willing to support my parents, my brother and sister.

Q: No.

A: Agree this is your family tree in D21?

Q: Yes.

**[70]** From the evidence and testimony of SP4 it is clear that she was hiding the fact that she had an interest in the estate when she said in evidence that she had no interest in the estate. It was only after being cornered with a lawyer's letter that she admitted she is a beneficiary under a secret trust. It is also clear from her evidence that she does not favour her brother Chen Yoke Choy (who is the father to the petitioners, Chen Teck Foong, Chen Teck Lee and Chen Teck Seng), although earlier she said that she is willing to support her parents, brothers and sisters. However, from her evidence subsequently, it is obvious

A that she is not willing to support one particular brother ie Chen Yoke Choy. No explanation was given for such reservation. This implies biasness and she certainly is not an independent witness and the likelihood of going to great lengths to ensure that Chen Yoke Choy or his privies would not benefit from the estate of the deceased.

B

THE STATE OF MIND OF THE DECEASED AT THE TIME OF MAKING THE WILL

C **[71]** In the case of *Tho Yow Pew & Another v Chua Kooi Hean* [2001] 5 MLJ 578 at p 582 it was decided that:

> ... where there are suspicious circumstances lurking behind the execution of the will, the onus is on the party propounding the will, to remove, by way of explanations, such suspicious circumstances. In order to test the testamentary capacity of the
D deceased it is necessary to establish that at the time of executing the will the deceased was 'of sound mind, memory and understanding'.

**[72]** However, the onus of establishing any extraneous vitiating elements such as undue influence, fraud or forgery lies on those who challenge the will
E (refer to *Eu Boon Yeap & Ors v Ewe Kean Hoe* [2008] 2 MLJ 868).

**[73]** From the evidence, the chronology of events that relates to the deceased's state of health are as follows:

F **[74]** Based on the witness statement of Chen Teck Foong (D36), he gave evidence that on 9 July 2007.

> ... the deceased was very weak and had to rely on the wheelchair as he had difficulty walking or standing by himself. The deceased also had difficulty fully understanding
G questions posed to him and give specific answers to simple questions posed. There was also communication breakdown with the deceased... The deceased also often suffered memory lapse in the middle of a conversation... The conversation often ends without knowing what the deceased wanted...

H **[75]** Further it was stated by Chen Teck Foong that on 10 July 2007:

> ... the health condition and state of mind of the deceased deteriorated very rapidly during the China trip... In terms of communication, the deceased gradually had more and more difficulty understanding simple questions like: 'Are you thirsty/ Do
I you want to go to use the toilet?' Towards the end of the trip, most of the time the deceased only stared blankly in the air even when I talked to him...

**[76]** The petitioner Chen Teck Lee in his witness statement at D51 (Q and A 13) said that on 15 July 2007 until 17 September 2007:

... immediately after the China trip, the deceased's condition deteriorated further. The deceased had no appetite to eat at all, vomited very often and suffered bladder and bowel incontinence.

...

The deceased's inability to communicate also deteriorated where the deceased often appeared too exhausted to communicate with anyone and most of the time, my family and I could not get an answer from him even for simple conversation like asking him whether he would like to eat and whether he would like to go to the toilet. The deceased's lapse of memory had significantly worsen too and most of the time, the deceased stared blankly in the air, looking dazed even when my family and I talked to him.

Around early August 2007, about 11/2 months before the deceased passed away on 17.9.2007, the deceased was very weak and was in bed all the time except eating and using the toilets. Around 7.9.20076 when the 1st petitioner came home from his overseas work, the deceased was not conscious of his surroundings...

On or about 22.7.2007, I left for overseas work and when I returned on 7.9.2007, I was very surprised that my own grandfather, the deceased could not recognize me. The deceased stared blankly at me as if he doesn't recognize me nor comprehend what is going on and his eyes were yellow probably due to his sickness.

From 7.9.2007 until his demise on 17.9.12007, the deceased occasionally grumble some sentences and things that did not make sense to the circumstance which he was in. I could remember vividly that the deceased had mumbled in my presence asking to turn on the lights in Chen Seong Chin & Sons's office which is situated near the deceased's house, when it was still bright daylight in the afternoon. The deceased's had previously only switched onn the lights in the said office during late evening when the sun has set. The deceased was also hallucinating and lost the sense of time. He often mumbles something and then when we tried to verify what he said, he did not response. This condition deteriorated very rapidly each day.

**[77]** The evidence of Chen Teck Foong and Chen Teck Lee are their personal recollections of the state of the deceased's mind as a result of their close association with the deceased during the last few months of his life. Chen Teck Foong (SD2) had accompanied the deceased for the China Trip on 9 July 2007 to fulfill the deceased's wish to visit China. At that point in time the deceased was already diagnosed of terminal cancer. Even at that time according to SD2, the deceased needed assistance to even change his shirts and he needed SD2 for support while standing. The deceased had to be supported to the toilet.

**[78]** D5 which is the medical history of the deceased stated that the deceased was admitted to the hospital on 18 July 2007 itself at 3.43pm and he was diagnosed as suffering from advanced terminal cancer which had spread to the liver and also suffering from anaemia where packed red cell transfusion was given as part of the treatment to the deceased.

**[79]** The defendants adduced some literature at D41 to show the symptoms of anaemia which includes fatigue, weakness, dizziness, headache, fuzzy thinking, loss of concentration, depression, have trouble concentrating or performing mental tasks. The literature at D41 also states that 'packed red cells transfusion' is given to patients who have severe anaemia. Hence the deceased's anaemia as at 18 July 2007 was a severe one as the treatment administered to him was packed red cell blood cells transfusion.

**[80]** It was also shown vide D40A that the medication that was prescribed to the deceased since 3 July 2007 was T Morphine SR 30mg BD, Syr Morphine 5mg PRN, Syr Lactulose 10ml daily. The side effects of morphine intake is indicated in D41 and D42 which are dizziness, lightheadedness, drowsiness, weakness, headache, confusion, double vision, hallucinations, blurred vision and fainting. It was also in evidence through the report of Dr Lu Ping Yan from KPJ Kajang Specialist Center dated 7 July 2007 which states that the deceased was suffering from advance colon cancer and that he needed 'sustained release morphine for alleviation' of pain. This report was prepared before the China trip.

**[81]** Chen Teck Foong said his testimony that:

> The health condition and state of mind of the deceased deteriorated very rapidly during the China trip. On the first day, the deceased could still stand from his wheel chair with some of my assistance to get into the tour van. However on the last day, the deceased had to rely on me completely to lift him up from the wheelchair to enter the van.
>
> In terms of communication, the deceased gradually had more and more difficulty understanding simple questions like: Are you thirsty? Do you want to go to the toilet" Towards the end of the trip, most of the time the deceased only stared blankly in the air even when I talked to him and sometimes I had to repeat questions up to 5 or 6 times with some gestures and sign languages before the deceased could understand the same simple questions. Most of the time, I have to guess his answer or guessed what he wanted.
>
> ... The deceased was also in constant pain during the trip. Morphine had to be given to him consistently and the deceased even requested for extra dosage before the next dose was due.

**[82]** Given the evidence by Chen Teck Foong and Chen Teck Lee as to the state of mind of the deceased, the medical history at D5 and the information in D41, D40A, the story that the deceased had walked alone unaided from his house to the office which is about 20 metres away on 18 July 2007 is rather far fetch. What more with the testimonies of SP1, SP2 and SP3 as to what actually happened on 18 July 2007 which are filled with material inconsistencies. As far as SP4 is concerned, she was not close to the deceased and hence is in no

position to know the state of the deceased's mind at that point in time on 18 July 2007. Her evidence suggests that she hardly visited the deceased. This was evident from the cross-examination of SP4:

Q: You know your father was diagnosed with terminal cancer?

A: I know he's not feeling well.

Q: Do you know when he's not feeling well?

A: I don't remember when but I know he's not feeling well.

...

Q: You're not very close to him?

A: *Because I stay away from him.*

Q: Do you know he was frequently in and out of hospital?

A: Yes.

Q: Would you know he has anaemia?

A: No.

Q: Do you know he vomited blood?

A: No.

**[83]** From the evidence of SP4, she is not privy and has no knowledge as to the state of mind of the deceased at the relevant time on 18 July 2007. Thus SP4's evidence cannot be relied on in this regard, besides the fact that she is not an independent witness.

**[84]** All the evidences point to the fact that the deceased, in all probability, was having the side effects of 'dizziness, lightheadedness, drowsiness, weakness, headache, confusion, double vision, hallucinations, blurred vision and fainting' which affects his mental capacity to execute the wills on 18 July 2007.

**[85]** In Williams, Mortimer and Sunnucks on *Executors, Administrators and Probate*, (19th Ed), Sweet & Maxwell, 2008, at p 182 para 13; 13 states that:

> It should be noted, however, that advanced disease of the liver, kidneys, heart or lungs may either poison the brain or deprive it of oxygen, so rendering the patient incapable... However, the terminal illness has in many cases been held so far to have impaired the mental capacity of the deceased as to cause to pronounce against the last will.

**[86]** Since there is evidence to show that prior to the material date (18 July 2007) the deceased was showing signs of having difficulty of understanding simple questions or answering coherently, shows that the deceased was

incapacitated mentally to execute the wills. It is incumbent on the petitioner Chen Yoke Kian to establish that at the time when the deceased was executing the two wills on 18 July 2007, he had the mental capacity to do so. There was no medical evidence adduced by Chen Yoke Kian to establish that the deceased had the mental capacity to do so. Even taking the evidence of Chen Yoke Kian himself, his evidence lack the credibility as explained above. Further it must be noted that there was evidence from Chen Teck Lee and Chen Teck Foong that Chen Yoke Kian was not on talking terms with the deceased. Although they stayed in the same house, they never had meals together and they stayed in different part of the same house with their own separate living area. This piece of evidence was not rebutted. With this kind of strained relationship between the deceased and Chen Yoke Kian, it is highly improbable that the deceased could have executed the wills as contained in ID1 and ID D6 which bequeathed the entire estate to Chen Yoke Kian.

**[87]** The evidences from Chen Teck Foong (SD2) and Chen Teck Lee (SD3) as to the state of mind of the deceased at the time just prior to the date of 18 July 2007 are vivid in that the deceased was having difficulty to understand the simplest of questions posed. There was communication breakdown and that the deceased was weak physically and mentally. After the China trip the deceased showed the after effects of usage of morphine ie looking dazed and confused.

**[88]** This is not just a case of the deceased of being physically weak, but mentally, there are grave doubts that he was capable of making rational decisions.

**[89]** It was also in evidence that SD2 used to work with the deceased at the office. SD2 in his evidence said that when he was working with the deceased, on numerous occasions he had brought cheques for the deceased to sign which the deceased did in front of SD2. SD2 further said in his evidence that he has never seen the deceased affixed his thumbprint as his signature. SD2 said that the deceased was a careful person in terms of work.

**[90]** This is evident when the first will dated 3 September 2003 was prepared by a professional will writer and that the deceased was verified by a doctor as fit to prepare a will then.

**[91]** From the evidence adduced, the petitioner Chen Yoke Kian has not proven that the deceased had the testamentary capacity to execute the will, let alone dispelling the suspicious circumstances surrounding the making of the will.

**[92]** It is to be noted that the two wills executed on 18 July 2007 were a

radical departure from the earlier will that was executed by the deceased on 3 September 2003 (D31) ie the earlier will in 2003 which provided for:

(a) the said property to Chen Teck Foong, Chen Teck Lee, Chen Teck Seng, Chen Teck Cheong and Chen Yoke Kian in equal shares;

(b) the shares in the company to petitioners Chen Teck Foong, Chen Teck Lee, Chen Teck Seng in equal shares; and

(c) residuary estate to Chen Teck Foong, Chen Teck Lee, Chen Teck Seng in equal shares.

**[93]** However the wills dated 18 July 2007 bequeathed everything to Chen Yoke Kian. It was in evidence through the evidence of SD2 and SD3 that the deceased's intention was to leave his estates to his grandsons ie the sons of Chen Yoke Choy. The reason why Chen Yoke Kian was given part of the property was because, it was actually to provide for Chen Yoke Kian's two minor sons who bear the 'Chen' family name. This was stated in evidence in witness statement at D36 in Q and A5 when SD2 said:

> When the deceased informed me and the 2 Petitioner in year 2003 that he intended to leave the said property to me and my 3 brothers, the 2nd petitioner reminded the deceased in my presence to give some inheritance to his remaining grandsons bearing 'Chen' surname, namely Chen Teck Zheng and Chen Teck Yang. As Chen Teck Zheng and Chen Teck Yang were respectively about 4 years old and 1 year old in 2003, the 2nd petitioner also suggested that the deceased may want to put the inheritance under the name of the minors' father, namely Chen Yoke Kian. The deceased then informed me and the 2nd Petitioner that he would give the said property to me, the 2nd petitioner, the 3rd Petitioner, Chen Teck Cheong and Chen Yoke Kian in equal shares and specifically mentioned that Chen Yoke Kian's share is meant for his 2 minor sons.

The above evidence was never challenged nor rebutted.

**[94]** It was also in evidence by SD2 that the deceased was very disappointed with Chen Yoke Kian when the deceased found out that Chen Yoke Kian was having an affair with the maid and that his marriage was in trouble which led to a divorce.

**[95]** SD2 also said that the deceased was not on talking terms with his three sons.

**[96]** Hence, that explains why the deceased did not provide for Chen Yoke Kian.

**[97]** There was no credible evidence shown by Chen Yoke Kian as to why the deceased suddenly have a radical change of mind and decided to make a

different will (wills) on 18 July 2007, totally depriving the grandsons that was provided for earlier and left the entire estate to Chen Yoke Kian. He did make a feeble attempt to justify the deceased's sudden change of mind in the 18 July 2007 will, ie by saying that the deceased was disappointed with his grandsons after the China trip. Even if what Chen Yoke Kian said is to be believed, then why provide only for one particular son whom the deceased was not particularly closed to and had been having a strained relationship all this while. Chen Yoke Kian's evidence is hard to believe. All these evidences add up to the suspicious circumstances that surrounds the making of the wills dated 18 July 2007.

**[98]** When the first will was executed in 2003, it was a time when the deceased was relatively well, yet there was an attending physician (SD4) who certify that the deceased was fit and sound in executing the said will and that it was prepared by a professional will writer. However, on 18 July 2007 with the condition of the deceased who was suffering from advance terminal cancer and had severe bouts of anaemia with the after effects of morphine at that point in time, it was not seen as fit to call a doctor to verify that the deceased knew and understood what he was doing.

**[99]** From the evidence, it shows that on 18 July 2007 at the time when the wills dated 18 July 2007 was executed, the deceased in all probability, was already very weak mentally and physically, not rational and terminally ill. Hence in that very weak state, it strongly suggests that Chen Yoke Kian could have exercised undue influence on the deceased. In the deceased's feeble state of mind, it is not surprising if the deceased wilted under pressure in executing the wills dated 18 July 2007, as the contents of the wills dated 18 July 2007 could not have been the intention of the deceased, given the circumstances of the creation of the wills.

**[100]** I find support in the passage in Williams, Mortimer and Sunnucks on *Executors, Administrators and Probate*, (19th Ed), Sweet and Maxwell, 2008, at p 2003, para 13–49:

> ... It is only when the will of the person who becomes a testator is coerced into doing that which he does not desire to do that it is undue influence... a person in the last days... may have become so weak and feeble, that a very little pressure will be sufficient to bring about the desired result, and it may even be that the mere talking to him at that stage of illness and pressing something upon him, may so fatigue the brain, that the sick person may be induced, for quietness sake, to do anything. This would equally be coercion, though not actual violence.

**[101]** It was also in evidence (D51) that on or about 18 June 2007 ie a month before the alleged execution of the wills dated 18 July 2007, when the deceased was diagnosed with advanced terminal colon cancer, Chen Yoke Kian got to

know from the deceased that the deceased had given Chen Teck Lee, a power of attorney in respect of the said property. It was in evidence that Chen Yoke Kian asked Chen Teck Lee to transfer the power of attorney in respect of the said property to him. This was not disputed nor rebutted. However at that point in time, Chen Teck Lee had informed Chen Yoke Kian that if the deceased was agreeable to transfer the power of attorney in respect of the said property to him (Chen Yoke Kian), the deceased was to inform him (Chen Teck Lee). Clearly, one month before 18 July 2007, Chen Yoke Kian already had plans to ensure that he had the authority over the estate of the deceased. When he failed to persuade Chen Teck Lee to transfer the power of attorney to him, he hatched a scheme to ensure he has his hands on the estate of the deceased. What better way than to create a will naming him as the entire beneficiary under the same just at the time when the deceased was at his weakest moments.

**[102]** Hence from the aforesaid, the inference is that, all was not well with the contents of the wills dated 18 July 2007 which was purportedly executed by the deceased.

CONCLUSION

**[103]** The petitioner Chen Yoke Kian had failed to produce the originals of the purported wills dated 18 July 2007 which was allegedly executed by the deceased.

**[104]** It is to be observed that the wills were made on the day that the deceased was admitted to hospital due to severe anemia and after vomiting blood.

**[105]** All the five documents (ID1, ID D6, ID D7, ID D17, ID D25) taken together show a course of conduct planned by Chen Yoke Kian to fabricate documents within a short span of time (before the demise of the deceased) to ensure that he is the sole beneficiary to the estate of the deceased. In fact one month prior to 18 July 2007, Chen Yoke Kian had already expressed his interest to monopolise the inheritance to himself when he approached Chen Teck Lee to persuade Chen Teck Lee to grant the power of attorney to him.

**[106]** The five documents were allegedly executed during the time when the deceased was seriously ill and was in no mental capacity to do so.

**[107]** Further, the marks on the alleged wills (ID1 and ID D6) bear a different mark from the deceased's usual signature and that there are two wills dated 18 July 2007 each bear a different mark. No explanation given by Chen Yoke Kian as to why the two wills, despite it being executed on the same date, bears a different mark.

**[108]** The petitioner Chen Yoke Kian also failed to disclose that there were two wills dated 18 July 2007 executed by the deceased at the earliest opportunity.

**[109]** The witnesses that testified on behalf of Chen Yoke Kian are all interested witness besides telling inconsistent stories. They lack credibility and the court is cautious in accepting their evidence as the truth.

**[110]** Clearly Chen Yoke Kian has failed to prove that the deceased has the testamentary capacity to execute the wills dated 18 July 2007 and failed to dispel the suspicious circumstances surrounding the making of the same.

**[111]** Therefore based on the aforesaid, both wills dated 18 July 2007 (1D1 and ID D6) are invalid.

**[112]** The will dated 3 September 2003 (D31) is deemed to be the last will of the deceased and is admitted to probate.

**[113]** The grant of probate is issued to Chen Teck Foong, Chen Teck Lee and Chen Teck Seng as joint executors.

**[114]** The petition in Suit S-32–817 of 2009 is allowed with costs.

**[115]** The petition of Suit S-32–280 of 2010 is dismissed with costs.

**[116]** Both costs of the probate action are to be borne by Chen Yoke Kian.

Reported by Ashok Kumar